FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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MISLEADING ASPECTS OF RESPONDENTS' STATEMENT

Several inaccuracies in Respondents' "Statement" require a reply. Respondents' denial that Owen requested a name clearing hearing (Brief for Respondents, p. 5) is impossible to square with the facts of this case. In a letter to the City Manager (P.Ex. 3, App. at 18-19, Tr. 22), plaintiff stated, *inter alia*:

> "I have requested that you afford me a charge and specification of charges in writing and that I be granted a public hearing and a right to be represented by counsel . . . [Y]*our relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.*" (Emphasis added)

This letter, although dated April 15, was received by the City Manager on April 18, 1972, the day after the meeting of the city council. (Tr. 229) The City Manager decided that there was no basis for a hearing (Tr. 247) and no separate response was made to Exhibit 3. A second request was made by Mr. Owen's former attorney. (D.Ex. 8, App. 26, Tr. 173) Both the District Court and the Court of Appeals found that two requests for hearings had been made and neither court ever suggested that these requests were insufficient. (Pet. App A16-17, Pet. App. A54-56) Owen was denied a hearing by a letter from the city counselor's office and no hearing was offered or given. (Pet. App. at A4, A17, A5)

Respondents' Statement (Brief for Respondents, p. 4) is further misleading when it refers to an "informal hearing" between Owen and the City Manager. A full reading of that reference to the trial court's opinion (Pet. App. at A51) clearly reflects nothing more than a short discussion which had none of the aspects of even an informal "hearing." The total evidence as found by the trial court and evaluated in both the opinions of the Eighth Circuit specifically found that petitioner did not at any time receive *any form* of name clearing hearing. (Pet. App. at A4)

Respondents' Statement (Brief for Respondents, p. 5) is also misleading in its emphasis on the Roberts' statement

and the statement (Brief for Respondents, p. 7) that "Owen brought lawsuits in state and federal courts based on Roberts' defamatory statement . . ." The unconstitutional harm to petitioner was a result of the official actions and decisions of the entire city council and the city manager, the highest officials of the city, not the act of a single councilman.

ARGUMENT

I

Respondents' Discussion of *Monell* Is Not Supported by Reason or Authority

Respondents' discussion of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (Brief for Respondents, pp. 13-28) is simply inconsistent with the opinion in that case. In *Monell*, this court stated that a city could not be held liable under §1983 if the sole basis for municipal liability was the fact that it was a city employee who committed the unconstitutional action. However, the court held that the city would be liable if the unconstitutional action "implements or executes a policy statement, ordinance, regulation or decision" of the city. *Id.* at 690. The city would be liable as an entity if "execution of the government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694.

Monell did not limit municipal liability to cases attacking a policy in the abstract. Rather, it specifically stated that municipalities would be liable when the "*action* that is alleged to be unconstitutional implements or executes" official policies or decisions. *Id.* at 690. In order to

have a case or controversy and for a plaintiff to have standing, every §1983 suit necessarily challenges some conduct - either actual or threatened - adversely affecting the plaintiff. An abstract attack on a policy or decision that has not been and will not be enforced does not present a case or controversy.

There is no indication in *Monell* that municipalities will be insulated if their policies or decisions are valid on their face but unconstitutional as applied. Quoting from *Nashville, C. & St. L. R. Co. v. Browning,* 310 U.S. 362, 369 (1940), the court said "Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law then the dead words of the written text." *Id.* at 691 n. 56. Of course, the policy or decision need not be reduced to writing. *Id.* at 691. Moreover, *Monell* permits actions challenging unconstitutional conduct executing or implementing municipal "decisions" (*Id.* at 690) not (as alleged at Brief for Respondents, p. 16) just those implementing a "statement, ordinance, regulation or other policy decision of general applicability and future effect." For example, the court noted that §1983 was intended to provide a remedy for uncompensated takings. *Id.* at 686-687.

Finally, there is nothing in *Monell* indicating that suits against municipalities under §1983 are to be divided into two types having different elements and standards of proof.

In the present case, official policy was similarly the moving force of the constitutional violation suffered by Mr. Owen. Applying the teachings of *Board of Regents v. Roth,* 408 U.S. 564 (1962) the Court of Appeals held the City of Independence liable for its refusal to grant appellant, its employee, a hearing which he sought to clear his name of the stigma imposed in the course of the termination of his employment. In its original opinion the Court said:

> "Accordingly we hold that the action of the City of Independence deprived Owen of liberty without due process of law, in violation of Owen's rights under the Fourteenth Amendment." (Pet. App. at A32).

The denial of a hearing was based upon the City Charter itself. The District Court found that "The Charter [of the City of Independence] did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment." (Pet. App. at A48). This factual finding was not disputed by any party. In its first brief in the Court of Appeals the City stated "Section 2.11 of the Charter would prohibit the council from holding such a [name clearing] hearing." (Original Brief for Appellees/Cross Appellants, at p. 32). In the same brief, the City argued:

> "Indeed, plaintiff's eighth finding of fact *recognizes that the City Charter and Personnel Rules denied plaintiff a right to reasons and a hearing prior to removal from office.*" *Id.* at 26. (Emphasis added)

Accordingly, the conclusion seems inescapable that the denial to petitioner of a hearing was the implementation of the official policy of the City as established by its Charter, certainly within the ambit of a "policy statement, ordinance, regulation or decision 'officially' adopted and promulgated by that body's officers." The "moving force" of the constitutional violation was "official policy" since it was the charter itself upon which the council based the denial of a hearing.

This by itself is sufficient to hold the City responsible under *Monell.* However, the City is also responsible because the stigma was created by acts of "those whose

edicts or acts may fairly be said to represent official policy." In an official city council meeting at which both the press and the public were present, a city councilman read a statement impugning Owen's honesty and integrity. (Pet. App. at A31). As part of the statement, the councilman moved that the results of the investigation be turned over to the prosecutor for presentation to the grand jury and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful or gross [sic] inefficient activities." (Pet. App. at A54 n. 2). The city council approved the statement and motion, passing the motion by a formal vote of the city council, thereby lending its support to the councilman's charges. (Pet. App. at A16, A31). The following day, the city manager discharged Owen. (Pet. App. at A26). He reinforced the implication of wrongdoing by publicly announcing that he was referring the matter to the prosecutor for submission to the grand jury. (Pet. App. at A3-4 and A31 n. 11).

After reviewing these facts in light of *Monell*, the Court of Appeals on remand specifically held that the City's action in stigmatizing Owen during the course of his discharge and denying him a hearing to clear his name were the implementation of City policy:

> "The city charter of Independence did not entitle the police chief to a name-clearing hearing in connection with his discharge, and Owen was not given one. We conclude that the stigma attached to Owen in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of Owen's constitutional rights, in violation of section 1983." (Pet. App. at A4).

The city declines to "quibble" with this conclusion (Brief for Respondents, p. 29) and gives no reason to reject it.

II

Respondents Give No Reason to Believe That the 42nd Congress Intended to Create a "Good Faith" Immunity for Municipalities Sued Under 42 U.S.C. § 1983

In our previous brief, we concluded that a city official's good faith belief that his actions were lawful did not immunize the municipality from liability under the common or statutory law prior to 1871. (Brief for Petitioner at 14-17) This conclusion was strongly reinforced by the thorough analysis contained in the Brief for National Education Association *et al.* Their research, like ours, did not reveal a single case in which any American court in the Nineteenth Century held that the good faith of municipal officials immunized the municipality itself. Brief for National Education Association *et al.* at 20.

Respondents make no claim that any such cases existed and do not assert that the common law recognized good faith immunity for municipalities. *Coolidge v. Brookline*, 114 Mass. 592 (1874), cited by Respondents at page 35, has nothing to do with municipal liability but simply held that the City of Brookline was not authorized to raise money to finance a lobbying campaign to block annexation by Boston. *City of Freeport v. Isbell*, 83 Ill. 440 (1877) simply held that, since the legislature had given the city the option of lighting or not lighting its streets, its failure to light them could not be common law negligence.

Respondents' citation (at page 29) of *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1979) is surprising since that case supports Owen's position—not Respon-

dents'. *Shuman* held that the good faith of city officials did *not* immunize the city from liability for damages or equitable relief. The Court said:

> "We conclude that in a case such as this, where a policy of a municipality is under attack, the doctrine of good faith immunity is not applicable. . . . Alternatively, we conclude that any immunity which might be applied would not bar equitable relief." *Id.* at 464.

The reliance of Respondents on the panel decision in *Bertot v. School District No. 1,* Slip Opinion No. 76-1169 (Brief for Respondents, p. 25) is misplaced. In *Bertot v. School District No. 1, Albany County, Wyoming,* No. 76-1169 (10th Cir. November 26, 1979) (En Banc), the 10th Circuit repudiated the prior panel opinion. The en banc decision held that a good faith defense was *not* available to the School District. The Court En Banc followed the analytical framework established by this Court's prior cases and discussed in Petitioner's prior brief at pages 11-13. The Court of Appeals recognized that municipalities did not have qualified immunity at common law:

> "[W]e begin by noting that the common law did *not* recognize the same qualified immunity in damage actions for public bodies that it did for public officials personally when acting in good faith. Prior to 1871, federal courts often awarded monetary relief in suits against public bodies for violation of the federal Constitution . . . To the extent that public bodies were afforded special protection, it was under the doctrine of sovereign immunity, as embodied in the Eleventh Amendment, a distinct theoretical construct. Where public bodies were amenable to suit, monetary damages were not precluded." Slip Opinion at 5. (Emphasis in the original)

Given this common law background, the Court of Appeals concluded that neither the language nor the legislative history of the Civil Rights Act of 1871 gave any indication that the 42nd Congress "intended to erode school boards' common law amenity to damage actions." Slip Opinion at 6. Since the language of the statute was unqualified, the Court could "not impute to such unequivocal language an intention to provide public bodies with an immunity broader than that enjoyed at common law." Slip Opinion at 6. The Court of Appeals went on to hold that the policy considerations justifying personal immunity for officials gave no support to creation of such an immunity for governmental entities. *Id.* at 7-8, 13-15. The Court further held that "equitable relief is not precluded by a good faith defense." *Id.* at 9-10.

The *Bertot* Court finally concluded "[W]e are faced with the manifest injustice that would result should Bertot not be compensated for the unconstitutional non-renewal of her contract." By comparison it did not seem unfair to the Court to hold liable a municipal entity which has demonstrably abused its powers to the injury of an individual victim. It deemed it fair that the costs of unconstitutional government action should be spread among the taxpayers, who reap the benefits of their government and who are ultimately responsible for it. "Section 1983 has, at its core, a concern for fundamental fairness between a powerful government and the individual." Slip Opinion at 15.

The 10th Circuit gave "particular attention" to the Eighth Circuit's two opinions in the present case. *Id.* at 10-12. It described the second decision as a "drastic flip-flop in that Circuit's immunity doctrine," which ignored the first opinion's "highly persuasive arguments for considering back pay to be an element of equitable relief

not protected by a public entity's good faith defense." *Id.* at 10. It rejected the Eighth Circuit's analysis of *Monell* and concluded: "We therefore do not believe that *Owen II* provides adequate justification for either providing the good faith defense to the School District or deciding any issue of relief beyond back pay." The *Bertot* Court also dealt with the earlier Second Circuit decision in *Sala v. County of Suffolk*, 604 F.2d 207, 210-11 (2nd Cir. 1979). The argument was accepted in *Sala* that imposition of liability on the School District as an entity would similarly deter creative and effective decision-making, since conscientious board members are as concerned about board liability as about personal liability. The Tenth Circuit rejected the conclusion of *Sala*, stating "[A]s a statement of purported psychological fact, we find that assertion unpersuasive." Slip Opinion at 8.

We should not end our discussion of *Bertot* without a comment as to the dissenting opinion of Judge Barrett which states (clearly erroneously we submit) that denying a "good faith" defense to a municipality might expose it to substantial "financial repercussions." (Slip Opinion Dissent of Judge Barrett, pp. 1-2) Judge Barrett's undifferentiated concern for "financial repercussions" seems to view the cost to a city occasioned by its unconstitutional acts as paramount over the right of individuals to be made whole for violations of their constitutional rights. Such has never been the law. The argument had already been rejected by this Court prior to the enactment of the Civil Rights Act of 1871. In *City of Galena v. Amy*, 5 Wall. 705, 710 (1867), the Court said:

> "The Counsel for the [city] has called our attention, with emphasis and eloquence, to the diminished resources of the city, and the disproportionate magnitude of its debt. Much as, personally, we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them."

Similarly, such consideration cannot outweigh the rights of individuals injured by unconstitutional municipal actions.

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals on remand should be reversed and the cause remanded for appropriate relief.

Respectfully submitted,

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